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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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NO. 27548-5-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ROBERT ALAN BROWN,

Defendant/Appellant.

REPLY BRIEF

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ARGUMENT

The State's brief argues harmless error analysis in connection with Robert Alan Brown's claims of instructional error and ineffective assistance of counsel.

The State's position is not well-taken. The State misinterprets existing case law and does not include appropriate citation of authority as required by RAP 10.3(a)(6).

Initially, the State asserts that the instructional error is not of constitutional magnitude. The State relies upon *State v. Kronich*, 160 Wn.2d 893, 161 P.3d 982 (2007) and *State v. Stein*, 144 Wn.2d 236, 27 P.3d 184 (2001).

The *Kronich* case involved a confrontation right issue based upon the admission of Department of Licensing (DOL) records in the absence of testimony from an appropriate custodian of records. It is inapplicable under the facts and circumstances of Mr. Brown's case.

On the other hand, the *Stein* case did involve an issue of instructional error. The Court instructed the *Stein* jury on alternative theories of conspiracy and accomplice liability. Only one (1) of those theories had been included in the Information.

The *Stein* Court ruled at 241:

If the instruction allowed the jury to convict Stein without finding an essential element of the crime charged, the State has been relieved of its burden of proving all elements of the crime(s) charged beyond a reasonable doubt, and thus the error affected his constitutional right to a fair trial. A defendant cannot be said to have a fair trial "if the jury might assume that an essential element need not be proved." *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (citing *State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983)). Failure to instruct on an element of the offense is thus error of constitutional magnitude. *Id.*

In Mr. Brown's case the trial court instructed the jury on an element of first degree kidnapping which was not included in the Amended Information. This allowed the jury to convict Mr. Brown of a crime with which he had not been charged.

A conviction for an uncharged crime is obviously a violation of the "essential elements" rule. *See*: Const. art. I, § 22; Sixth Amendment to the United States Constitution.

Under no circumstance can the instructional error in Mr. Brown's case be considered formalistic. The error is substantive. The error is truly manifest.

The State's claim that the instructions accurately state applicable law and were not misleading is unsupported by the record or citation to authority.

The State ignores the cumulative effect of the instructional error(s). Not only was an uncharged alternative included in the first degree kidnap-

ping instruction; but the trial court further defined the word "homicide" and advised the jury that it was the law that if a person "fails to act" he can be guilty of felony-murder. This is a complete misstatement of the law in Washington. It is based upon an old jury instruction which is no longer a recommended instruction. *See*: WPIC 25.01.

Mr. Brown concurs with the State that a felony-murder charge can be established by any of the alternative means of the underlying offense. What the State does not present to the Court is a case where a felony murder conviction has been affirmed based upon the Information containing one (1) alternative means and the jury instructions containing a different alternative means of committing the underlying offense.

The State recognizes that it must prove the elements of the underlying felony beyond a reasonable doubt. *See*: *State v. Bryant*, 65 Wn. App. 428, 438, n. 11, 828 P.2d 821, *review denied*, 119 Wn.2d 1015 (1992).

It is at this point that the State segues into the harmless error analysis by relying upon *Neder v. United States*, 527 U.S. 1, 144 L. Ed.2d 35, 119 S. Ct. 1827 (1999) and *State v. Brown*, 147 Wn.2d 330, 58 P3d 889 (2002).

Both the *Neder* and *Brown* cases involve jury instructions containing a misstatement of the law. The instructions in those cases did not involve an uncharged alternative means. Thus, neither *Neder* nor *Brown* is analogous to what occurred in this case.

Rather, Mr. Brown asserts that, as set forth in his original brief, the cases of *State v. Bray*, 52 Wn. App. 30, 756 P.2d 1332 (1988) and *State v. Doogan*, 82 Wn. App. 185, 917 P.2d 155 (1996) control.

Moreover, error is harmless only if the other instructions clearly and specifically define the uncharged alternative. The uncharged alternative of "to inflict extreme mental distress" is not defined by the jury instructions. The charged alternative ("to inflict bodily injury") was not included in the jury instructions. Thus, the conviction can only be on the uncharged alternative.

There is no way to isolate this instructional error from the jury's verdict on the kidnapping charge. The error is not harmless.

An error infringing upon the defendant's constitutional rights is presumed to be prejudicial, and the State has the burden of proving the error was harmless. The error cannot be declared harmless unless it was "harmless beyond a reasonable doubt."

A "harmless error" is one which is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." An appellate court will consider such error only when giving or not giving an instruction invades a fundamental constitutional right of the accused and would probably change the result of the case. That determination requires careful attention to the words actually used in the instruction because whether a defendant has been accorded full constitutional rights depends on the way a reasonable juror could have interpreted the instruction.

State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997), quoting *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

The instructional error in Mr. Brown's case is not trivial. It is not academic. It is not formalistic.

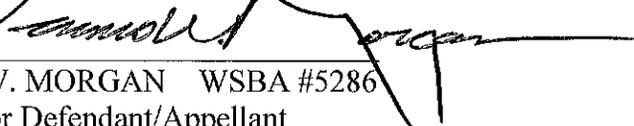
As set forth in Mr. Brown's initial brief controlling case law clearly asserts that instructional error of this nature is presumed prejudicial.

The State's argument that the homicide instruction was not prejudicial fails due to the fact that the prosecutor argued in both his closing and rebuttal arguments that Mr. Brown failed to act and thus was responsible for Mr. Esquibel's death. Thus, when the State asserts that there is an "equally compelling and reasonable inference from the jury verdict ... that the jury convicted him [Mr. Brown] based upon the actions he took as opposed to those actions that he chose not to take" significantly shows that the State did not meet its burden of proof beyond a reasonable doubt.

Again, there is no way to determine which of the alternatives was the basis upon which the jury relied for conviction. Mr. Brown otherwise relies upon the argument and authorities contained in his original brief.

DATED this 21st day of October, 2009.

Respectfully submitted,


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